INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Reasons for granting the writ	10
Conclusion	13
Appendix A	14
Appendix B	17

CITATIONS

Cases:

Inter-State National Bank of Kansas City v. *Frank Luther, Trustee*, 221 F. 2d 382, pending on writ of certiorari, No. 242, this Term. 10, 11, 12, 13

Luther, Frank, Trustee, v. *United States*, 225 F. 2d 495 8

Statutes:

Agricultural Act of 1949, 7 U. S. C. 1421 *et seq.*. 4

Bankruptcy Act of July 1, 1898, 30 Stat. 544, as amended, 11 U. S. C. 1, *et seq.*:

Section 2 (a) (7) 10, 14

Section 57 (l) 10

Section 60 10

Section 60 (a) (1) 14

Section 60 (b) 15

367021—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK LUTHER, TRUSTEE OF THE GARDEN GRAIN AND SEED CO., INC., BANKRUPT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause on July 5, 1955.

OPINIONS BELOW

The findings of Fact, Memorandum Opinion, Conclusions of Law and Order entered by the Referee in Bankruptcy (R. 33–58 (No. 4929))[1]

[1] Both the United States and the Trustee in Bankruptcy appealed from the order of the District Court. By direction of the Court of Appeals for the Tenth Circuit, the records on the two appeals (Nos. 4928 and 4929 in that court) were separately printed and the Turstee's appeal (No. 4929)

are not reported. The District Court wrote no opinion. Its order sustaining in all respects the action of the Referee (R. 88–90 (No. 4929)) is not reported. The opinion of the Court of Appeals (App. B, *infra,* pp. 17–39) is reported at 225 F. 2d 499.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1955 (App. B, *infra,* p. 39). A petition for rehearing, filed by the United States, was denied on July 27, 1955 (App. B, *infra,* pp. 39–40). By order dated October 20, 1955, Mr. Justice Clark extended the time of the United States for filing a petition for a writ of certiorari to and including November 24, 1955 (App. B, *infra,* p. 40). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the absence of the claimant's consent and over his timely objection, the summary jurisdiction of the United States District Court sitting in a bankruptcy case extends to controversies between the claimant and the Trustee over property not in the actual or constructive possession of the court, but acquired by the claimant prior to bankruptcy and held at bankruptcy under a bona fide claim of right.

---

was heard and decided in advance of the Government's appeal (No. 4928). The decision of the Court of Appeals on the Trustee's appeal is reported at 225 F. 2d 495. References herein to the records will identify the record referred to by using the respective Court of Appeals' number.

2. Whether a claimant who files a proof of claim in the bankruptcy court thereby gives his consent to a summary determination of an affirmative action against him by the Trustee which would otherwise require plenary proceedings.

STATUTE INVOLVED

Sections 2 and 60 of the Bankruptcy Act of July 1, 1898, 30 Stat. 544, 545 and 562, as amended, 11 U. S. C. 11 and 96, are set forth in Appendix A, *infra,* pp. 14–16.

STATEMENT

The Garden Grain and Seed Co., Inc., a public warehouse doing business under the corporation and warehouse laws of the State of Kansas, was adjudicated an involuntary bankrupt on January 18, 1952, and the cause was referred to the Referee (R. 36 (No. 4929)). On the date of adjudication, Garden Grain held in its storage warehouses as bailee, 4,320,900 lbs. of milo, a fungible agricultural commodity, owned by the Commodity Credit Corporation and private persons as tenants in common (R. 39 (No. 4929)). None of the milo so stored was owned by the bankrupt. The bankrupt's possession of this grain, together with 505,640 lbs. which was in transit at the time of bankruptcy (R. 39, 51 (No. 4929)), passed to the Trustee who, upon order of the court, sold the grain and segregated the proceeds in a special account for ultimate distribution to the owners of the milo (R. 39, 51 (No. 4929)).

The United States, on behalf of the Commodity Credit Corporation, filed its proof of claim with the bankruptcy court (R. 1–8 (No. 4929)), asserting, *inter alia,* that Commodity was the owner of a total of 3,130,002 lbs. of milo which had been delivered to the bankrupt for storage or handling before bankruptcy;[2] that the bankrupt was a mere bailee of the milo for storage or handling purposes; that title to it had never passed to the bankrupt; and that the Trustee had not acquired title, legal or equitable, to it. Commodity claimed an immediate right of possession to this milo or to its proceeds in the hands of the Trustee (R. 5–6 (No. 4929)). With respect to the milo thus claimed by Commodity, the Referee found that at the date of bankruptcy Commodity had warehouse receipts, or had previously surrendered such receipts without obtaining delivery, for a total amount of 3,130,002 lbs. of milo (R. 39 (No. 4929)). Since the valid claims of other milo depositors totaled 4,705,428 lbs., the bankrupt, as of the date of bankruptcy and exclusive of milo subsequently repossessed by the Trustee, was short in its milo account by 3,514,530 lbs. (R. 39 (No. 4929)).

In addition to filing an answer and counterclaim to the Government's proof of claim (R. 8–11 (No.

[2] Title and ownership of this grain was acquired by Commodity in fulfillment of price support obligations imposed upon the Department of Agriculture by the Agricultural Act of 1949, 7 U. S. C. 1421 *et seq.*

4929)), the Trustee filed in the bankruptcy court a pleading captioned as an "Action to Recover the Value of 9,642,260 lbs. of Yellow Milo Obtained by the Commodity Credit Corporation from Bankrupt Within Four Months of Bankruptcy, Which Constitutes a Preference" (R. 11 (No. 4929)). By this action the Trustee sought to recover from the United States 9,642,260 lbs. of milo, valued at $228,521.56. The Trustee's pleading alleged that the delivery of this grain to Commodity by the bankrupt within the four months preceding bankruptcy constituted a preferential transfer within Section 60 of the Bankruptcy Act (11 U. S. C. 96, App. A, *infra*, pp. 14–16) on the grounds that at that time the Garden Grain was in fact bankrupt; that Commodity knew and had good and sufficient reason to believe that Garden Grain was bankrupt (R. 12 (No. 4929)); and that the transfer had resulted in Commodity's obtaining a greater percentage of its indebtedness than other creditors of the same class. The pleading prayed that Commodity be required to restore the 9,642,260 lbs. of milo, or its value, to the bankrupt's estate (R. 12 (No. 4929)).[3]

[3] For the purposes of determining the ownership of the milo in the court's possession, the Trustee filed in the bankruptcy court an "Action in the Nature of an Interpleader" (R. 18–28 (No. 4929)). In this so-called action he referred to and sought to incorporate the action to recover the 9,642,260 lbs. of milo or its value to be included in the milo fund.

The United States moved to dismiss the Trustee's suit to recover the alleged preferential transfer on the ground, among others, that the bankruptcy court was without summary jurisdiction in the premises. The motion pointed out that the United States had not consented to the recovery of a preference from Commodity in summary proceedings and further that, since the Trustee's petition disclosed that the milo sought to be recovered was not the property of the bankrupt and was not in its actual or constructive possession at the time of the bankruptcy adjudication, the milo was not subject to the jurisdiction of the bankruptcy court (R. 33–34 (No. 4928)). Following the Referee's oral denial of the motion to dismiss (R. 38–39 (No. 4928)), the United States filed its answer to the "Action to Recover," denying the critical allegations and again asserting that its consent to a summary determination of the issues raised had not been given and that the bankruptcy court did not have summary jurisdiction of the controversy raised by the Trustee's pleading (R. 36–37 (No. 4928)).

Despite the Government's continued contention that the bankruptcy court had no summary jurisdiction to adjudicate the matter, the Referee considered the case on the merits. He found that from September 30, 1951, to the date of bankruptcy, Commodity withdrew from storage 9,436,-

780 lbs. of milo (R. 40 (No. 4929)).[4] The Referee further found that on September 30, 1951, the bankrupt was insolvent and that on that date Commodity had reasonable cause to believe that such was the case, it having received information that the bankrupt was short in its storage accounts and therefore unable to fulfill the demands of any storage depositor without using grain belonging to other depositors (R. 41 (No. 4929)).

While the Referee presumed to recognize that the delivery of this milo to Commodity during the four-month period preceding bankruptcy did not come within the definition of a preferential transfer as set out in Section 60 of the Bankruptcy Act (11 U. S. C. 96, App. *infra*, pp. 14–16), because the bankrupt had no title to such property but only a right of possession as a bailee (R. 49 (No. 4929)), he, nevertheless, undertook to exercise equitable powers so as to achieve the same result as if there had been preference. Stating that the court "in the exercise of its equitable jurisdiction has the power to make a complete accounting" (R. 49 (No. 4929)) and that "Equity and good conscience can only lead

[4] From September 30, 1951, to bankruptcy, the bankrupt sold or otherwise disposed of 34,809,795 lbs. of milo in addition to the 9,436,780 lbs. which was returned to Commodity as the owner thereof (R. 38 (No. 4929)) pursuant to the terms of the Uniform Grain Storage Agreement between Garden Grain and Commodity (R. 3–22 (No. 4928)).

the court to the conclusion that Commodity must be charged with the milo it obtained from the bankrupt after September 30, 1951, in the amount of 9,436,780 pounds, or the value thereof" (R. 50 (No. 4929)), the Referee proceeded to treat the 9,436,780 lbs. of milo withdrawn by the United States after September 30, 1951, as if in fact it had been recaptured by the Trustee.

The Referee added this 9,436,780 lbs. of milo to the 4,826,540 lbs. actually in the Trustee's possession, and increased, by the same amount, the Government's milo claim to 12,566,782 lbs., and the total milo claims to 17,272,210 lbs. Using these figures, the Referee computed the Government's *pro rata* share at 10,377,992 lbs., deducted from this the 9,436,780 lbs. previously acquired by the Government, and allowed the United States the difference, 941,212 lbs., as its distributive share of the grain physically in the possession of the Trustee (R. 57 (No. 4929)).[5] To the extent that the Government's milo claim is not satisfied from the milo fund it becomes and is allowable as a claim against the general assets of the bankruptcy estate with most of it entitled to a fifth priority (R. 57 (No. 4929)). See *Frank Luther, Trustee* v. *United States,* 225 F. 2d 495 (C. A. 10).

[5] This had the effect of reducing the Government's proportionate interest in the milo in the Trustee's physical possession from 1,927,720 lbs. to 941,212 lbs.—a reduction of 986,508 lbs., with a value of $23,380.24.

The District Court affirmed the Referee's decision in all respects (R. 88–90 (No. 4929)). On appeal to the court below, the Government contended that, in view of its timely and continued objections, the bankruptcy court was without jurisdiction to adjudicate in a summary proceeding the issues raised by the Trustee's action to recover the milo previously delivered to Commodity and that since the Milo delivered to Commodity by the bankrupt after September 30, 1951, was not and had never been in the Trustee's possession, and was held by Commodity under a good faith claim of right, a plenary proceeding was necessary to determine the right of the Trustee or third persons to all or any part of such milo. The Court of Appeals affirmed the order of the District Court with respect to its exercise of its summary jurisdiction, holding that the United States, by filing in the bankruptcy proceeding its claim to the milo in the possession of the Trustee, had invoked the summary jurisdiction of the bankruptcy court, and that the District Court had properly held that the United States was accountable for and chargeable with the 9,436,780 lbs. of milo delivered to Commodity between September 30, 1951, and the date of the bankruptcy adjudication (App. B, *infra*, pp. 17–39).[6]

[6] In accordance with this ruling, the Referee on October 4, 1955, entered an order directing the distribution of the milo fund and on October 6, 1955, the fund was distributed to the several milo claimants. The validity of the distribution or-

REASONS FOR GRANTING THE WRIT

The questions presented by this case are virtually identical to those presented in *Inter-State National Bank of Kansas City* v. *Frank Luther, Trustee,* 221 F. 2d 382 (C. A. 10), pending on writ of certiorari, No. 242, this Term. Both cases originated in the bankruptcy proceedings of the Garden Grain and Seed Co., Inc., and in each the Trustee in Bankruptcy, in response to claims filed against the estate, sought to have set aside allegedly preferential transfers within the definition and limitations of Section 60 of the Bankruptcy Act (11 U. S. C. 96). Although in each case timely and continued objections were interposed to the jurisdiction of the bankruptcy court summarily to adjudicate the issues raised by the Trustee's actions to recover the alleged preferences (Section 2 (a) (7) of the Bankruptcy Act, 11 U. S. C. 11 (a) (7), App. *infra,* p. 14), in each case the objections were overruled and pursuant to determinations on the merits the Trustee was permitted, directly in *Inter-State* and indirectly here, to recover, in a summary proceeding,

---

der is now before the District Court on the Government's petition for review. Should this Court reverse the judgment below, the fund so distributed may be summarily recaptured under Section 57 (l) of the Bankruptcy Act (11 U. S. C. 93 (l)) from the distributees who are still interested parties in the bankruptcy estate. Section 57 (l), in substance, confers summary jurisdiction upon the bankruptcy court to recover all or part of an excess dividend paid to any creditor. Hence, the distribution of the milo fund by the trustee did not render moot the issues here presented.

property which was not in the actual or constructive possession of the bankrupt on the date of the adjudication of bankruptcy, or later in like possession of the Trustee.

While there are technical distinctions between the court's rulings in the two cases, those distinctions are based merely on the difference in the relationship of the Trustee to the respective properties involved.[7] In the *Inter-State* case, the allegedly voidable transfer involved property to which the bankrupt held title, whereas in the instant case the challenged transfer concerned property of which the bankrupt was merely a bailee. In *Inter-State,* the court below held that the trustee had a right to recapture the transferred property in a summary bankruptcy proceeding. In the instant case, the court below found it unnecessary to pass directly upon the question whether the trustee could, in his "Action to Recover," likewise recapture summarily the bailment property, because the bankruptcy court had, through the application of equitable doctrines, achieved the same result by the indirect method of taking into account and charging the United States with the transferred property when it allocated the bailment property among

[7] The court below recognized the close relationship between the issues presented in the two cases. Oral argument in the *Inter-State* case was heard by a three-judge panel. Later, *Inter-State* was set down for reargument together with the instant case before the court *en banc.*

the various claimants. But, in both cases, the decisions of the court below held that the holders of the transferred property, *i. e., Inter-State* and the United States, respectively, had consented to the adjudication of questions relating to the transferred property in a summary proceeding, and that they had both impliedly given their consent merely by their actions in filing proofs of claim in the bankruptcy proceedings. Hence, the effect of the two decisions is the same, for they both establish summary jurisdiction in a bankruptcy court to adjudicate questions concerning property which is in the hands of a claimant who has filed a proof of claim in the bankruptcy proceeding, despite the fact that such property has never been in the actual or constructive possession of the bankruptcy court, and despite the fact that the claimant has timely objected to the exercise of the summary jurisdiction.

Since this Court has already granted Inter-State's petition for a writ of certiorari (*Inter-State National Bank of Kansas City* v. *Frank Luther, Trustee,* No. 242, this Term) and since the reasons for the granting of the writ in *Inter-State* are, in large measure, applicable here, a review by the Court of the instant case is also called for.[8]

[8] There is, of course, a possibility, although not an absolute certainty, that the Government's claim, which is entitled to a fifth priority in the bankruptcy proceedings, will be

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. Since the issues in this case will be presented in *Inter-State,* the Court may find it appropriate to hold this case pending the disposition of *Inter-State,* and then decide it in accordance with the disposition of that case.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
JOHN G. LAUGHLIN,
Attorneys.

NOVEMBER 1955.

---

satisfied in large part or even in full upon final distribution of the bankrupt's estate. But that possibility would hardly seem to warrant letting the instant decision stand, should this court reverse the *Inter-State* decision.

APPENDIX A

Section 2 of the Bankruptcy Act of July 1, 1898, 30 Stat. 544, 545, as amended, 11 U. S. C. 11, provides in relevant part as follows:

> (a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, * * *, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, * * *, to—
>
> * * * * *
>
> (7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, * * *; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

Section 60 of the Bankruptcy Act of July 1, 1898, 30 Stat. at 562, as amended, 11 U. S. C. 96, provides in relevant part as follows:

(a) (1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a petition under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

* * * * *

(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however,* That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary pro-

ceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

* * * * *

APPENDIX B

United States Court of Appeals, Tenth Circuit

Nos. 4928-4929—May Term, 1955)

Appeal and Cross-Appeal from the United States District Court for the District of Kansas

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK LUTHER, TRUSTEE OF THE GARDEN GRAIN & SEED CO., INC., APPELLEE, IN THE MATTER OF GARDEN GRAIN AND SEED CO., INC., BANKRUPT

FRANK LUTHER, TRUSTEE OF THE GARDEN GRAIN & SEED CO., INC., CROSS-APPELLANT

v.

UNITED STATES OF AMERICA, CROSS-APPELLEE, IN THE MATTER OF GARDEN GRAIN AND SEED CO., INC., BANKRUPT

(July 5, 1955)

John G. Laughlin, Atty., Dept. of Justice (Warren E. Burger, Asst. Atty. Gen.; William C. Farmer, U. S. Atty.; and Melvin Richter, Atty., Dept. of Justice, were with him on the briefs), for appellant and cross-appellee.

Malcolm Miller for appellee and cross-appellant.

Before PHILLIPS, *Chief Judge,* and BRATTON, HUXMAN, MURRAH and PICKETT, *Circuit Judges.*

PHILLIPS, *Chief Judge.*

Garden Grain and Seed Co., Inc.,[1] doing business under the corporate and warehouse laws of the State of Kansas, operated grain warehouses at Garden City, Ingalls, and Pierceville, Kansas. On January 16, 1952, the Grain Company was adjudged an involuntary bankrupt. A trustee in bankruptcy was appointed and, in addition to the general assets of the Grain Company, took possession of 490,560 pounds of wheat and 4,320,900 pounds of milo, which the Grain Company held in storage for Commodity and others at the inception of the bankruptcy.

On August 15, 1952, the United States, in behalf of its wholly owned corporate instrumentality, the Commodity Credit Corporation,[2] filed its proof of claim in the bankruptcy proceeding.

This is an appeal from an order of the referee in all respects confirmed by the district court on a petition for review, allowing in part and disallowing in part such claim. In its claim the United States alleged, inter alia, that the Grain Company was indebted to it in the aggregate amount of $148,059.89; that 207,696.12 cwt. of milo and 20,941.71 bushels of wheat had been stored with the Grain Company, pursuant to Uniform Grain Storage Agreements, executed on June 9, 1949, and July 1, 1950; that Commodity either held warehouse receipts for such grain at the inception of bankruptcy or had surrendered

[1] Hereinafter called the Grain Company.

[2] Hereinafter called Commodity.

warehouse receipts for such grain without obtaining delivery prior to bankruptcy; that during the period from October 17, 1950, to May 23, 1951, Commodity surrendered warehouse receipts and issued loading orders to the Grain Company requiring it to load out and deliver 187,207.16 cwt. of milo; that no shipping orders were issued by Commodity to the Grain Company for the remaining 20,488.96 cwt. of milo nor for the 20,941.71 bushels of wheat and that Commodity still owns warehouse receipts from the Grain Company for such milo and wheat; that the market value of such undelivered milo was $52,554.18 and the market value of such undelivered wheat was $49,317.73; that Commodity is the owner of 10,811.06 cwt. of milo which the Grain Company failed to deliver pursuant to shipping orders and of 20,488.96 cwt. of milo and of 20,941.71 bushels of wheat for which no shipping orders were issued by Commodity to the Grain Company, and that if the Grain Company or the trustee has sold or otherwise disposed of such milo and wheat and is unable to deliver possession thereof to Commodity, then the proceeds of such milo and wheat are the property of and should be paid to Commodity.

By the terms of a Storage Guarantee Agreement, entered into on April 3, 1950, the Grain Company agreed to construct a new elevator at Pierceville, Kansas, and to reserve 75 percent of its capacity for grain tendered for storage by Commodity or by farmers for storage for their account, and Commodity agreed that if the average occupancy of the facility for any reason should be less than 75 percent of the storage

capacity, Commodity would pay the additional charges specified in Paragraph 8 of the Agreement. The Pierceville elevator was completed and ready for occupancy on October 30, 1950. In December 1951, the Grain Company filed a corrected voucher of $8,094.29 for charges under such Paragraph 8 for the year commencing October 30, 1950, and ending October 31, 1951. Seventy-five percent of the claim, or $6,070.72, was provisionally paid on December 18, 1951.

In its proof of claim the Government sought to recover the amount of the provisional payment on the ground that the Grain Company had violated the terms of the Uniform Grain Storage Agreements and the Storage Guarantee Agreement.

The balance of the Government's claim of $148,059.89 is made up of storage overcharges, quality deficiencies on grain delivered, and other items which are not now in dispute.

The trustee sold the 490,560 pounds of wheat and 4,320,900 pounds of milo, which the Grain Company had in storage at the inception of bankruptcy. He received $18,271.25 for such wheat and $103,995.25 for such milo, and now holds the proceeds of such sales for ultimate disposition to storage claimants. The funds are referred to as the Milo Fund and the Wheat Fund.

The trustee filed interpleaders in the bankruptcy proceeding in which he set up that he had in his possession $103,995.25, proceeds of the sale of milo which came into his possession; that there should be added to such Milo Fund $11,961.19 received from milo in transit at the time bankruptcy ensued and $228,521.56, the value of 9,642,260

pounds of milo which the trustee was seeking to recover from Commodity; that there had been filed with the trustee numerous claims by individuals who alleged that they held warehouse receipts for milo and numerous claims by individuals who alleged that they had placed milo with the Grain Company on open storage.

He further set up that he had in his possession $18,271.25, the proceeds of the sale of wheat which came into his possession, and that numerous claims for wheat had been filed by parties alleging that they had stored wheat with the Grain Company which had not been delivered to them.

He further set up the filing of the claim of Commodity.

The trustee asked that various claimants, including Commodity, be interpleaded, and that their respective rights in the Milo and Wheat Funds be adjudicated.

The trustee also filed what he captioned "Action To Recover The Value of 9,642,260 lbs. of Yellow Milo Obtained By Commodity Credit Corporation From Bankrupt Within Four Months of Bankruptcy, Which Constitutes A Preference." In that pleading the trustee alleged that Commodity had issued loading orders for milo and had surrendered warehouse receipts to the Grain Company at the time the loading orders were issued; that before shipments were made pursuant to the loading orders, Commodity learned of grain shortages in the storage facilities of the Grain Company and caused an audit to be made of the Grain Company's books and records on October 7, 1951, which audit was completed, written and delivered to Commodity on October 18, 1951; that on Octo-

ber 7, 1951, Commodity knew that the Grain Company was 88 percent short in its storage obligations; that Commodity induced the Grain Company to give preference to shipments to Commodity, knowing that "the bankrupt did not have for its account, nor did the bankrupt own, the grain so shipped and that the grain shipped was not stored grain," and that pursuant to such inducement the Grain Company shipped 9,642,260 pounds of milo to Commodity within the four-month period preceding bankruptcy; that such shipments were made when the Grain Company was, in fact, bankrupt and resulted in Commodity obtaining a greater percentage of its indebtedness than other creditors of the same class; that such shipments were made at a time when Commodity knew the Grain Company was bankrupt and that the grain shipped did not belong to Commodity.

The trustee prayed that Commodity be required to restore such milo, or the value thereof, in the amount of $228,521.26.

In the action to recover, the trustee also sought recovery of the unpaid balance of the corrected voucher, in the sum of $2,023.57.

The United States moved to dismiss the so-called action to recover on the ground that the court lacked jurisdiction of the controversy and that the United States had not consented to the adjudication of the alleged preference in a summary proceeding. The motion was denied by the referee. Such asserted defenses were again raised in the Government's answer to the action to recover.

Early in September, 1951, a Kansas warehouse examiner, having statutory authority so to do,

began an examination of the Grain Company's storage accounts. He found the records of the Grain Company were improperly kept and that there was a shortage of 132,235 bushels of milo in its storage account. About the same time an auditor of Commodity began an examination of the Grain Company's storage accounts and found it was short in its milo storage account more than 10,713,060 pounds and that the state examiner had failed to uncover that shortage. Subsequent to September 30, 1951, and after it had full knowledge of such shortages of the Grain Company's storage accounts, Commodity obtained from the Grain Company on loading orders 9,436,780 pounds of milo. No other storer of milo with the Grain Company withdrew any milo after September 30, 1951. In a written report made by Commodity's auditor on October 18, 1951, it was stated that the Grain Company was 88 percent short in its storage liability.

The referee made findings of fact and filed a memorandum opinion and concluded that Commodity's claim should be allowed to the extent of $103,594.46. The referee found that Commodity was entitled to 3,130,002 pounds of milo and 769,802 pounds, or 12,830.03 bushels, of wheat.

The referee denied the right of the United States to recover the provisional payment and found that it was obligated under the Storage Guarantee Agreement to pay the trustee a balance of $12,829.28, after crediting Commodity with the provisional payment. The referee disallowed the claim of preference, but held that equity and good conscience required that Commodity be charged with the milo obtained by

Commodity from the Grain Company after September 30, 1951, in the amount of 9,426,780 pounds, or the value thereof. As a result, the referee found that Commodity's pro rata interest in the Milo Fund was 941,212 pounds, of the value of $22,611.51.

The referee found that the pro rata interest of Commodity in the Wheat Fund was 258,280 pounds, of the value of $9,619.81.

The referee further found that to the extent Commodity's grain claims were not satisfied from the Wheat and Milo Funds, they were valid claims against the estate. Accordingly, the referee concluded that the unsatisfied grain claims totaled $51,874.32 for 2,188,790 pounds of milo and $19,011.49 for 511,522 pounds of wheat. Of these amounts 142,919 pounds of milo and 342,615 pounds of wheat were represented by warehouse receipts acquired by Commodity after bankruptcy. The referee held that the value of such receipts was $10,830.39.

The referee held that exclusive of the pro rata interest of the United States in the two funds, the total indebtedness to Commodity amounted to $71,363.04. That figure includes, in addition to the unsatisfied grain claims, $247.01 for a difference in grade allowance and $230.22 for overpaid storage charges. The referee held that such amount was subject to offsets totaling $31,711.46. Of the balance the referee concluded that $28,-821.19 was to be paid as a fifth priority and that the $10,830.39, representing the value of receipts acquired after bankruptcy, was allowable as an unsecured claim.

I

THE MILO AND WHEAT FUNDS

The title to the milo and wheat, which were in the possession of the Grain Company at the time of the adjudication, which passed into the possession of the trustee, and which the trustee converted by sale into the Milo Fund and Wheat Fund, was not in the Grain Company and did not pass to the trustee.[3] Such milo and wheat were held by the Grain Company as bailee, and belonged to the holders of warehouse receipts and the storers of grain who stored on open storage. Such milo and wheat were fungible and became part of the common masses in storage. Each of the owners became tenants in common of their proportionate share of the grain in storage.[4] It follows that the theory of the trustee's pleading in his counter-claim was untenable. There could be no preference with respect to property that belonged to third persons and the title to which was not in the bankrupt.[5] The referee so held.

We need not determine whether the trustee could have brought an interpleader action in the bankruptcy proceeding, rather than a plenary action, had the claimants to the stored grain not invoked the summary bankruptcy jurisdiction to adjudicate their rights in the common masses of stored grain and the Milo Fund and Wheat

---

[3] *In re Wright-Dana Hardware Co.*, 2 Cir., 211 F. 908, 911; 11 U. S. C. A. § 110.

[4] *Central States Corp.* v. *Luther*, 10 Cir., 215 F. 2d 38, 45, and cases cited in Note 10, infra.

[5] 11 U. S. C. A. § 96 (a); 8 C. J. S., Bankruptcy, § 193a, p. 650.

Fund into which such masses were converted.[6] Here, Commodity and the other claimants filed claims in the bankruptcy proceeding, by which they invoked the summary jurisdiction of the bankruptcy court to adjudicate their rights in such common masses and the funds into which they were converted.[7] By so invoking that jurisdiction, they consented to an adjudication of their claims by the bankruptcy court in the exercise of its summary jurisdiction.[8]

In the trustee's action in interpleader he made the facts alleged in his action to recover part of the interpleader pleadings by reference. We may disregard the action to recover and pass on the rights of the United States and the other claimants on the issues raised by their claims and on the facts alleged in the interpleader and established by the evidence. The interpleader action was not an action to recover back grain that Commodity had received, but, rather, it was an

---

[6] See, however, *Inter-State National Bank of Kansas City* v. *Luther*, 10 Cir., 221 F. 2d 382; and *Central States Corp.* v. *Luther*, 10 Cir., 215 F. 2d 38.

[7] In its claim Commodity expressly alleged that the title to the stored milo and wheat, which came into the possession of the trustee, had never passed to the Grain Company and did not pass to the trustee; that neither the Grain Company nor the trustee had any title, legal or equitable, to such milo and wheat, but were merely bailees thereof; and that if the trustee had sold or otherwise disposed of such milo and wheat, the proceeds of such sales were the property of and should be paid to Commodity.

[8] *James Talcott, Inc.* v. *Glavin*, 3 Cir., 104 F. 2d 851, 853, c. d. 308 U. S. 598; *Page* v. *Arkansas Natural Gas Corporation*, 8 Cir., 53 F. 2d 27, 35, Aff'd 286 U. S. 269; Remington on Bankruptcy, 5 Ed. (Henderson), Vol. 5, § 2200.

action to have determined the rights of the tenants in common to the grain that remained in the hands of the Grain Company a d the possession of which passed to the trustee. The referee did not adjudge that the trustee was entitled to recover back the grain delivered to Commodity after September 30, 1951, on shipping orders presented to the Grain Company. What the referee did do was adjudge that the grain so delivered to Commodity on shipping orders during such period should be considered in determining the rights of Commodity to share with other claimants in such common masses and the funds into which they had been converted through sale by the trustee.

Since all of such storage claimants, including Commodity, were tenants in common in the common masses, each was entitled to his pro rata share of the grain in storage on September 30, 1951.[9]

The evidence clearly established that there was a very large shortage when Commodity issued its shipping orders and received grain out of the common masses in storage after September 30, 1951; that it was impossible for the Grain Company to deliver the full amount of the stored grain owned by the several claimants; and that Commodity knew such facts and induced the Grain Company to deliver grain to Commodity, to the detriment of the interests therein of other claimants. Since there was a shortage in the stored grain and an insufficient amount to satisfy the

[9] *Central States Corp.* v. *Luther*, 10 Cir., 215 F. 2d 38, 45, and cases cited in note 10.

lawful claims of all the storage claimants at the time grain was delivered to Commodity on such shipping orders, each storage claimant, including Commodity, was entitled to share in the grain on hand in the proportion that the grain stored by it bore to the total amount of grain stored by the storage claimants.[10] In that proportion, each storage claimant, as a tenant in common, owned an undivided interest in the grain on hand at the time Commodity received grain from the common masses on its shipping orders. It follows that when Commodity received, after September 30, 1951, a portion of its undivided interest in the grain on hand, it was only entitled to receive the remainder of its proportionate interest from the grain remaining in the common masses in storage. To hold otherwise would give Commodity a portion of the grain remaining on hand, which belonged in undivided interests to the other storage claimants. The only way that Commodity could be limited to its proportionate interest of the grain on hand in the common masses on September 30, 1951, was to charge its interest with the amount of grain that was delivered to it out of the short common mass on its shipping orders. That is what the referee did. In other words, the referee did not require Commodity to return any of the grain delivered to it, but simply charged that grain against Commodity's proportionate interest in the common mass of grain which was short. The result is that Commodity received its full proportionate interest in the grain in the common mass which was short, and the other stor-

[10] *Goodman* v. *Northcutt*, 14 Or. 529; 13 P. 485; *Dole* v. *Olmstead*, 36 Ill. 150, 155–156.

age claimants will receive their proper proportion of such grain.

We conclude that the referee applied the proper theory in determining the proportionate amounts in the Milo and Wheat Funds to which Commodity was entitled, but because of our conclusion, hereinafter set out, with respect to the rights of Commodity under a warehouse receipt issued to one Hewes and transferred to Commodity, the proportionate amounts to which Commodity was entitled in the Wheat Fund will have to be recalculated.

II

THE STORAGE GUARANTEE AGREEMENT

The capacity of the Pierceville elevator when completed on October 30, 1950, was 280,000 bushels. In the Storage Guarantee Agreement of April 3, 1950, it was agreed by the Grain Company that upon completion of the facility it would reserve 75 percent of the storage capacity thereof for grain which might be tendered for storage by Commodity, or by farmers for storage for their account. By paragraph 7 of such Agreement, the charges payable by the United States for storage and related services for grain handled, stored, or considered to be stored, in the facility were to be at rates prescribed in the Uniform Grain Storage Agreement entered into between the Grain Company and Commodity. In Paragraph 8 of the Guarantee Agreement it was agreed that "if the average occupancy of the facility (based on grain stored or considered to be stored therein) during any year for which this section 8 is operative is less than 75 percent of

the storage capacity" a sum in addition to that provided in Paragraph 7 would be paid to the Grain Company. The method for computation of such additional amount is set out in Paragraph 8. The Guarantee Agreement recited that Commodity desired to encourage the construction of commercial warehouse facilities for the storage of grain in areas where such storage was inadequate; that the Grain Company desired to participate in such program; and that Commodity desired the completion of the Pierceville facility in time to assist in the handling and storage of the 1949 and 1950 wheat, milo and barley crops.

We think it clearly was the intent of the parties, that in order to induce the construction of the Pierceville facility and the setting apart of 75 percent of the storage of that facility to Commodity and farmers for storage for their account, that if the storage by Commodity and farmers for storage for their account in such facility was less than 75 percent of capacity, Commodity would reimburse the Grain Company under the provisions of Paragraph 8 of the Guarantee Agreement. Such, we think, is the plain import of the language of the Guarantee Agreement. In order to carry out that intent, it would be necessary to treat the Pierceville facility as an independent facility.

Moreover, in paragraph numbered one of the Guarantee Agreement, it is provided that the Grain Company shall construct a warehouse facility of the following description:

☒ New elevator
☐ Annex or addition
Type of construction: concrete * * *

It will be observed that the square preceding the phrase "new elevator" is checked and that the square preceding the phrase "annex or addition" is blank.

The Guarantee Agreement further provided that "Unless the facility is an addition or annex to an existing warehouse covered by a Uniform Grain Storage Agreement, the Warehouseman shall qualify for and execute a Uniform Grain Storage Agreement covering the facility promptly after completion."

Commodity and the Grain Company entered into a second Uniform Grain Storage Agreement dated July 1, 1950—the date it was contemplated the Pierceville facility would be completed—which covered the Pierceville facility.

Furthermore, the original voucher and the corrected voucher referred to above were predicated entirely on the average occupancy of the Pierceville facility and the amount it fell below 75 percent of the storage capacity of that facility, and was in nowise based upon storage in or capacity of other facilities of the Grain Company and Commodity made the provisional payment, subject to a final audit without in anywise objecting or excepting to the basis upon which the claim was predicated. Thus, it will be seen that the parties prior to the time any controversy had arisen treated the Pierceville facility as an independent facility and construed the guarantee to be applicable to the amount the average occupancy of the Pierceville facility fell below 75 percent of its storage capacity, without regard to the capacity of or grain stored in other facilities of the Grain Company.

Where the parties to a contract have given it a practical construction by their conduct, such construction is entitled to great weight in determining its proper interpretation, especially where such practical construction occurred before any controversy arose."[11]

The referee concluded that the Pierceville elevator was a new facility and not an annex or addition.

The referee found that during the year beginning November 1, 1950, and ending October 31, 1951, the aggregate daily average storage for wheat and milo in the three facilities was 482,975 bushels and that such quantity was less than the storage capacity at the Garden City Air Base, a facility which existed at the time of the building of the Pierceville facility under the Guarantee Agreement. The referree then purportedly applied the rate computation schedule in Paragraph 8 of the Guarantee Agreement and arrived at a total liability of $18,900. The referee arrived at that conclusion on the premise that in determining the liability under the Guarantee Agreement all grain in storage between November 1, 1950, and October 31, 1951, must first be credited to the Air Base facility and that only in the event the average daily storage exceeded the capacity of the Air Base facility should grain be considered as stored in the Pierceville facility.

The referee credited the provisional payment of $6,070.72 and adjudged that there was due the

[11] *Norton* v. *Agricultural Bond & Credit Corporation*, 10 Cir., 92 F. 2d 348, 351, 352, c. d. 302 U. S. 763; *Commercial Standard Ins. Co.* v. *Remer*, 10 Cir., 119 F. 2d 66, 70.

Grain Company from Commodity a balance of $12,829.28.

Commodity challenges the conclusion of the referee on two theories. The first theory advanced is that the Pierceville facility was an addition to the existing warehouse at the Air Base and by virtue of the express provisions of Paragraph 6 of the Guarantee Agreement, "all grain delivered to the warehouse by Commodity and farmers for storage for their account shall be considered as first stored in and last removed from the facility" and that since the referee found that the aggregate total daily storage for wheat and milo during the operative period of the Guarantee Agreement was in excess of the guaranteed capacity of the Pierceville facility, under an application of Paragraph 6, Commodity fulfilled its guarantee. The second theory advanced, in the alternative, by Commodity is that the Pierceville facility is an independent facility and therefore the provisions of Paragraph 6 of the Guarantee Agreement were inapplicable; that Commodity's liability under the Guarantee Agreement should be based on the amount the average storage of grain by Commodity or by farmers for their account in the Pierceville facility fell below 75 percent of the storage capacity of such facility; that the referee erred in failing to make any allowance for grain actually in storage, or which should have been in storage, in the Pierceville facility during the period involved; and that the evidence disclosed that large amounts of grain were stored in the Pierceville facility by Commodity or for its account during the period involved.

Both theories were advanced by Commodity in its petition for review and are therefore reviewable here.[12]

For the reasons indicated above, we are of the opinion that the Pierceville facility was a new facility and not an addition or annex. Paragraph 6 is expressly applicable only to an annex or addition to an existing warehouse and, therefore, has no application here.

We conclude that the alternative theory advanced by Commodity was proper and should have been applied by the referee.

In computing the average daily occupancy of the Pierceville facility, if the Grain Company issued warehouse receipts to Commodity or to farmers for grain stored in that facility, and converted and disposed of that grain, the grain covered by such receipts, though not actually held in storage, should be considered. The Grain Company could not receive grain for storage from Commodity and from farmers, dispose of the grain unlawfully, and then claim a deficiency in the 75 percent guaranteed storage.

The Guarantee Agreement provided that the Grain Company should keep accurate books, records, and accounts with respect to all transactions relating to grain stored in the Pierceville facility and furnish such reports as Commodity might from time to time request. Admittedly, the Grain Company did not comply with this provision of the Guarantee Agreement. But it is obvious that sufficient books and records are avail-

[12] *In re Samuel Wilde's Sons*, 2 Cir., 144 F. 972; *In re Elmore Cotton Mills*, D. C. Ala., 217 F. 810, 819; *In re Kellar*, 1 Cir., 192 F. 830, 832.

able to enable the trustee to determine the amount of grain stored in the Pierceville facility for Commodity or by farmers for their account and that Commodity has suffered no damage as a result of the Grain Company's failure to keep complete and accurate books, records, and accounts.

III

THE HEWES TRANSACTION

In July, 1951, J. D. Hewes delivered to the Grain Company for storage in its elevators 486,700 pounds of wheat and the Grain Company issued to him scale tickets therefor, bearing the notation that they represented stored grain. On January 3, 1952, Hewes surrendered the scale tickets and received from the Grain Company a check in part payment for the wheat. On the following day, Hewes returned the check and the Grain Company issued to him a warehouse receipt for 486,700 pounds of wheat. Thereafter, but before bankruptcy, Hewes assigned the warehouse receipt to Commodity as collateral security for a loan. The referee held that such wheat did not constitute a claim against the Wheat Fund, for the reason that when the scale tickets were surrendered and the check delivered to Hewes, the relationship of bailor and bailee between the Grain Company and Hewes ceased to exist, and the relationship of debtor and creditor came into being, and inasmuch as the Grain Company did not own any stored wheat against which the receipt could have been issued on January 4, and such receipt was not registered, it was invalid and did not create in Commodity any right in the Wheat Fund.

Upon the issuance of the scale tickets to Hewes he became vested with the right to participate as a tenant in common in the common mass of stored wheat. Even though the transaction on January 3 terminated the relationship of bailor and bailee and created the relationship of debtor and creditor, it is clear from the record that on January 4 the parties intended to and undertook to rescind the transaction of January 3 and restore the previous relationship of bailor and bailee which had existed from the time the wheat was actually stored and the scale tickets representing such storage issued. The transactions of January 3 and January 4 were free from fraud on the part of Hewes. He acted in good faith. It is well settled that a sale or contract of sale may be rescinded by agreement or mutual consent of the parties.[13]

Here, it was clearly the intention of the parties manifest by their acts to restore Hewes to the position he occupied prior to the transaction of January 3.[14] The fact that there was not sufficient wheat in storage belonging to the Grain Company to cover the warehouse receipt, we think is immaterial. Likewise, the fact that there was insufficient wheat in store to cover the claims

---

[13] *Mangan* v. *United States*, 254 U. S. 494, 497; *Monte Vista Farmers' Coop. P. Co.* v. *Bemis Bro. Bag Co.*, 8 Cir., 294 F. 8, 12, 13; *Earnest E. Fadler Co.* v. *Hesser*, 10 Cir., 166 F. 2d 904, 907; *Riggens* v. *Pomona Products Co.*, 82 Ga. App. 636, 61 S. E. 2d 682, 684; *Gleaner Harvester Corp.* v. *Anderson*, 148 Kan. 836, 84 P. 2d 838; 77 C. J. S., Sales, § 91, p. 778.

[14] *E. T. C. Corporation* v. *Title Guarantee & Trust Co.*, 271 N. Y. 124, 2 N. E. 2d 284, 286.

of storage claimants was immaterial. Hewes owned an undivided interest as a tenant in common with the other storage claimants of the wheat in store when he was restored to his former position by the rescission. The transfer of the warehouse receipt transferred that claim to Commodity. We conclude that Commodity was entitled to have the 486,700 pounds of wheat considered in determining its pro rata interest in the Wheat Fund.

IV

PRIORITY AND OFFSET

The referee concluded that the claim of Commodity aggregated $103,594.36. That amount included $32,231.32, payable from the Milo and Wheat Funds, leaving $71,363.04 as a claim against the bankrupt estate. The referee allowed $10,830.39, representing the value of receipts acquired by Commodity after bankruptcy as an unsecured claim, leaving a balance of $60,532.65. The claim of Commodity was subject to offsets aggregating $31,711.46. The referee applied the offsets to such balance and allowed the remainder, or $28,821.19 as a fifth priority.

Commodity contends that the offsets should have been first applied to the unsecured claim and that it should have been awarded $39,651.58 as a fifth priority.

11 USCA § 108b provides that "A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which * * * (2) was purchased by or transferred to him after filing of the petition * * *." That provision, we think,

clearly precludes the off-setting of the unsecured claim against the indebtedness of Commodity to the bankrupt estate, which is, in effect, what Commodity asks us to do.

V

THE MEASURE OF DAMAGES

The referee found that the net market price of milo in the warehouse at the inception of bankruptcy was $2.37 per cwt. and the net market price of wheat at the same time and place was $2.23 per bushel, after deducting handling and loading charges. The referee applied those prices in arriving at the amount of Commodity's claim. Commodity contends that the referee should have applied the highest intermediate value between the time of conversion or notice thereof and a reasonable time thereafter; namely, $2.56½ per cwt. for milo, the price on December 10, 1951, and $2.35½ per bushel for wheat, the price on November 27, 1951, on the ground that the milo and wheat had no fixed or stable value and tended to fluctuate from day to day.[15]

The evidence established that Commodity would have sold the milo and wheat in October, 1951, had it been able to obtain delivery from the Grain Company. Commodity learned of the conversions prior to September 30, 1951. On October 16, 1951, its auditor completed his report. The market price in October and early November was less than the market price on the date of bankruptcy. Within a reasonable time after full notice of the conversions, Commodity could have

[15] See *In re Salmon Weed & Co.*, 2 Cir., 53 F. 2d 335.

purchased grain on the open market to replace the grain which had been converted,[16] had it desired to do so.

Therefore, assuming without deciding that the "highest intervening price" rule is applicable here, Commodity suffered no injury as a result of the market price applied by the referee.

The cause is remanded, with instructions to modify the order allowing the claim of Commodity in accordance with the views herein expressed.

Judgment (entered July 5, 1955)

Twenty-fifth day, May Term, Tuesday, July 5th, 1955.

Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton, Honorable Walter A. Huxman, Honorable Alfred P. Murrah, and Honorable John C. Pickett, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that these causes be and the same are hereby remanded to the said district court with instructions to modify the order allowing the claim of Commodity Credit Corporation in accordance with the views expressed in the opinion of the court.

ORDER

Thirty-ninth day, May Term, Wednesday, July 27th, 1955.

---

[16] See *In re Salmon Weed & Co., supra.*

Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton, Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered that the said petition be and the same is hereby denied.

Supreme Court of the United States

No. ——, October Term, 1955

United States of America, petitioner

v.

Frank Luther, trustee

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 24, 1955.

(s) Tom C. Clark,
Associate Justice of the Supreme Court of the United States.

Dated this 20th day of October 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

FILED
DEC 23 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 535.

UNITED STATES OF AMERICA,
Petitioner,

vs.

FRANK LUTHER, TRUSTEE OF THE GARDEN GRAIN AND SEED CO., INC., BANKRUPT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN F. EBERHARDT,
608 Fourth National Bank Building,
Wichita 2, Kansas,
MALCOLM MILLER,
608 Fourth National Bank Building,
Wichita 2, Kansas,
Counsel for Respondent.

E. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 1-3080

INDEX

Opinions Below 1
Jurisdiction 2
Question Presented 5
Statute Involved 5
Statement 5
Reason for Denying the Writ 8
Argument 8
Conclusion 15
Appendix 17

Cases and Authorities

Alexander v. *Hillman*, 296 U. S. 222, 80 L. Ed. 192 ..... 12, 14
Banco Kentucky's Receiver v. *National Bank*, 137 S. W. 2d 357, 281 Ky. 784 12
Bank v. *Schorn*, 135 F. 2d 538, CA 2 13
Barnes v. *Patrick*, 28 P. 2d 293, 176 Wash. 142 9
Carson State Bank v. *Grant Grain Co.*, 197 N. W. 146, 50 N. Dak. 558 9
Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 84 L. Ed. 110 12
Central States Corporation v. *Luther*, 215 F. 2d 38, CA 10, cert. denied 348 U. S. 951, 99 L. Ed. 307 12
Century Ins. Co. v. *First National Bank*, 102 F. 2d 726, CA 5, cert. denied 308 U. S. 570, 84 L. Ed. 478 ..... 9, 12
Clark v. *Rogers*, 183 Fed. 518, CA 1, affirmed 228 U. S. 534, 57 L. Ed. 953 13
Conway v. *Union Bank of Switzerland*, 204 F. 2d 603, CA 2 12
Davis v. *Mercantile Trust Co.*, 152 U. S. 590, 38 L. Ed. 563 4
De Laney v. *City and County of Denver*, 185 F. 2d 246, CA 10 9
Dows v. *National Exchange Bank of Milwaukee*, 91 U. S. 618, 23 L. Ed. 214 9
Epstein v. *Goldstein*, 118 F. 2d 73, CA 2 4

Flour Mills of America, Inc. v. *Burris Mills*, 174 Kan. 709, 258 P. 2d 341 ..... 9, 10
Gulley v. *Wisdom*, 69 F. 2d 495, CA 5 10
100 9
Hall v. *Pillsbury*, 44 N. W. 673, 43 Minn. 33 9
Harris v. *Avery Brundage Co.*, 305 U. S. 160, 83 L. Ed.
Hoven v. *McCarthy Bros. Co.*, 204 N. W. 29, 163 Minn. 339 9
In re Bowling Green Milling Co., 132 F. 2d 279, CA 6 ..... 9, 10
In re Knox-Powell-Stockton Co., 97 F. 2d 61, CA 9 4
In re Metropolitan Trust Co., 218 U. S. 312, 54 L. Ed. 1051 4
Inter-State National Bank v. *Luther*, 221 F. 2d 382, CA 10, cert. granted ..... U. S. ..... , 100 L. Ed. 51 13
Interstate Oil Co. v. *Gormley*, 105 F. 2d 431, CA 9, cert. denied 308 U. S. 626, 84 L. Ed. 522 4
Jackson v. *Sevatson*, 82 N. W. 634, 79 Minn. 275 9
Kastner v. *Andrews*, 194 N. W. 824, 49 N. Dak. 1059 9
McDonnell v. *Bank of China*, 33 F. 2d 816, CA 9, cert. denied, 280 U. S. 612, 74 L. Ed. 654 10
McLean v. *Jaffray*, 71 F. 2d 743, CA 8, Cert. denied 293 U. S. 602, 79 L. Ed. 694 4
Moses v. *Teetors*, 64 Kan. 149, 67 Pac. 526 9
Nieter v. *McCaull-Dinsmore*, 199 N. W. 85, 159 Minn. 395 9
Osage Oil & Refining Co. v. *Mulber Oil Co.*, 38 F. 2d 396, CA 10 4
Palmer Clay Products Co. v. *Brown*, 297 U. S. 227, 80 L. Ed. 655 11
Partridge v. *Clarkson*, 72 F. 2d 108, CA 8 4
Porter v. *Warner Holding Co.*, 328 U. S. 395, 90 L. Ed. 1332 12
Seaboard National Bank v. *Rogers Milk Products Co.*, 16 F. 2d 271, CA 2 4
Sharp v. *Haney*, 78 F. 2d 195, CA 8 4

Speers Sand & Clay Works v. *American Trust Co.*, 37 F. 2d 572, CA 4 4
Switow v. *Sher*, 186 So. 519, 136 Fla. 284 12
Taylor v. *Producers Pipe & Supply Co.*, 114 F. 2d 785, CA 10 12
Torgerson v. *Quinn-Shepherdson Co.*, 201 N. W. 615, 161 Minn. 380 9
United States v. *City of Jacksonville*, 167 F. 2d 366, CA 5 9
United States v. *Marxen*, 307 U. S. 200, 83 L. Ed. 1222 15
Wake Development Co. v. *Auburn-Fuller Co.*, 71 F. 2d 706, CA 9 4
Walser v. *International Union Bank*, 21 F. 2d 294, CA 2 13
Wilson v. *Kiesel*, 164 U. S. 248, 41 L. Ed. 422 4

---

56 Am. Jur., Par. 167, p. 397; Par. 231, p. 426; Par. 232, p. 426 10
13 Cyc. Fed. Proc., 3d Ed., Par. 58.22, p. 314, Par. 58.26, p. 318 4
11 U. S. C. 11 ..... 5, 28
11 U. S. C. 93 (1) 3
28 U. S. C. 1254 (1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 535.

UNITED STATES OF AMERICA,
Petitioner,

vs.

FRANK LUTHER, TRUSTEE OF THE GARDEN GRAIN AND SEED CO., INC., BANKRUPT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The United States, for and on behalf of its corporate instrumentality, the Commodity Credit Corporation, has

filed a petition praying that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit. Such judgment affirming, insofar as herein material, the decision of the District Court, was filed July 5, 1955. A petition for rehearing was denied on July 27, 1955. The opinion of the Court of Appeals, sitting *en banc*, is reported in 225 F. 2d 499.

The controversy originated in bankruptcy in the United States District Court for the District of Kansas where the first decision was made by The Honorable E. R. Sloan, Referee in Bankruptcy. The opinion of the Referee is unreported but is contained in the record, pages 33 through 58, with corrections at Record page 60, the record referred to being No. 4929 in the Court of Appeals.* The United States filed a petition for review which was heard by The Honorable Delmas C. Hill, Judge of the United States District Court for the District of Kansas. The Court sustained the findings, conclusions and judgment as entered by the Referee. This decision is unreported but is contained in the record. (R. 88-90, No. 4929).

JURISDICTION.

The United States invokes the jurisdiction of this Court under 28 *U. S. C.* 1254 (1). There are two matters which we feel must be brought to the Court's attention since they present a jurisdictional problem:

First: The mandate of the Court of Appeals was spread of record in the United States District Court and,

---

*The record in the Court of Appeals is contained in part under No. 4929 and in part under No. 4928. Each record citation herein will refer to the page and the appropriate number from the record in the Court of Appeals.

pursuant thereto, a hearing was held before the Referee in Bankruptcy on September 29, 1955. At such hearing the United States was represented by the United States Attorney for the District of Kansas and by three attorneys from the Department of Agriculture. An agreement was reached concerning the distribution of the Milo fund and based thereon, an order was subsequently entered for distribution of such fund. The fund was distributed on October 6, prior to the time this petition for certiorari was filed. A partial transcript of these proceedings carrying out the mandate of the Court of Appeals is contained in the appendix hereto at page 17. Immediately following such transcript we have set forth in the appendix the order entered by the Referee in Bankruptcy for distribution of the fund. (Appendix, page 23). We understand, of course, from the petition for writ of certiorari filed by the United States, that it is contended that the funds so distributed pursuant to the order can be summarily recaptured under 11 *U. S. C.* 93 (1). We suggest that plainly under such provision of the statute reference is made to a dividend from the general assets of a bankrupt and that such section is not applicable in any manner or form to the distribution here involved of a special fund owned by various individuals as tenants in common. In the argument portion of this brief in opposition we will set forth the controversy relative to such special fund since it forms the subject matter of the litigation insofar as the petition for writ of certiorari is concerned.

Second: The controversy which forms the subject matter of this particular phase of the litigation from the District of Kansas concerns a fund held separate by the Trustee, which fund resulted from the liquidation of the Milo inventory of the bankrupt warehouseman. Such inventory was not owned by the bankrupt and was insuffi-

cient to meet the demands of the many individuals who claimed such inventory. The Courts below have determined, in a series of hearings, the owners of such inventory. The United States in its present petition is attacking an order made as to its right and ownership in such fund. However, it has appealed and here seeks certiorari without making parties to this phase of the litigation any of the individuals who have actually received the fund. We suggest that clearly this Court should not adjudicate that Commodity has a greater right to a greater quantity of such fund resulting from liquidation of inventory since the necessary effect thereof is to take from the other claimants a portion of what they have claimed, proved and received. All such parties were tenants in common, along with the United States, of such inventory and the fund resulting from liquidation of such inventory.* We call these matters to the Court's attention since we feel it our duty to do so. They will not be referred to hereinafter in the argument portion of this brief.

---

*There are many cases illustrating this principle that all the parties who are tenants in common must be present in court in order for an Appellate Court to change the distribution and right to distribution of one of such tenants in common. *Seaboard National Bank* v. *Rogers Milk Products Co.*, 16 F. 2d 271, CA 2; *Speers Sand & Clay Works* v. *American Trust Co.*, 37 F. 2d 572, CA 4; *Osage Oil & Refining Co.* v. *Mulber Oil Co.*, 38 F. 2d 396, CA 10; *Epstein* v. *Goldstein*, 118 F. 2d 73, CA 2; *McLean* v. *Jaffray*, 71 F. 2d 743, CA 8, Cert. denied 293 U. S. 602, 79 L. Ed. 694; *Davis* v. *Mercantile Trust Co.*, 152 U. S. 590, 38 L. Ed. 563; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 54 L. Ed. 1051, 1054; *Wilson* v. *Kiesel*, 164 U. S. 248, 41 L. Ed. 422; *Sharp* v. *Haney*, 78 F. 2d 195, CA 8; *Interstate Oil Co.* v. *Gormley*, 105 F. 2d 431, CA 9; cert. denied 308 U. S. 626, 84 L. Ed. 522; *In re Knox-Powell-Stockton Co.*, 97 F. 2d 61, CA 9; *Partridge* v. *Clarkson*, 72 F. 2d 108, CA 8; *Wake Development Co.* v. *Auburn-Fuller Co.*, 71 F. 2d 706, CA 9; and see 13 Cyc. Fed. Proc., 3d Ed., Par. 58.22, p. 314, and Par. 58.26, p. 318.

QUESTION PRESENTED.

We believe there is only one question presented: Where a Court and the Court's appointed trustee come into possession of a fund which does not form a part of the assets of a bankrupt, which fund is claimed by a great many individuals, all of whom file claims alleging ownership and seeking posession of such fund, does the Court, on the trustee's action in the nature of interpeader, interpleading all such individuals claiming ownership, have jurisdiction to determine the owners of such fund and to determine how such fund should be divided among the several owners?

STATUTE INVOLVED.

We submit that the only pertinent statute involved is Sec. 2 of the Bankruptcy Act, 11 *U. S. C. A.* 11, pertinent portions of which are set forth in the appendix hereto, beginning at page 28.

STATEMENT.

The Garden Grain & Seed Co., Inc., was a licensed warehouseman under the laws of the State of Kansas. It was adjudicated an involuntary bankrupt on January 18, 1952, and the case referred to the Referee in Bankruptcy. On the date of adjudication the bankrupt had in its possession and held in its warehouses as bailee, 4,320,900 lbs. of Milo which was stored in a commingled mass. (R. 36, No. 4929). This Milo, with the consent of all parties, was sold by the trustee and the proceeds placed in a special account. (R. 39, No. 4929).

The United States, for and on behalf of the Commodity Credit Corporation, filed its proof of claim and alleged, insofar as relevant here, that it was the owner of 3,130,002 lbs. of Milo represented by warehouse receipts and open loading orders. It asked that it be adjudged the owner of such quantity of Milo and that it obtain an order for the immediate possession thereof. (R. 1, 2-3, 5-6, No. 4929).

The trustee filed an answer, counterclaim and action to recover, admitting that Commodity held warehouse receipts and/or open loading orders for 3,130,002 lbs. of Milo, but alleging that Commodity had, with knowledge of the bankrupt warehouseman's great shortage, obtained 9,642,260 lbs. of Milo, which it did not own, to the detriment of the other grain depositors, and prayed for recovery of such amount of Milo. (R. 8-9, 11-12, No. 4929).

The trustee attached to such pleading copy of an audit report dated October 18, 1951, prepared from findings obtained on October 7, 1951, by the Assistant Chief Auditor of the Office of Audit of the United States Department of Agriculture. Such audit was directed to the Director of the Commodity office in Kansas City, Missouri, in whose jurisdiction the bankrupt warehouseman, Garden Grain & Seed Co., Inc., came. Commodity's auditor made a physical verification of the grain inventory of the bankrupt and found it 88% short of being in sufficient quantity to redeem the storage obligations of the warehouseman and further found that the warehouseman was converting grain to procure money. The auditor made a number of recommendations relating to Commodity's procedure and the closing of the warehouse. (R. 13-18, No. 4929).

The trustee also filed an action in the nature of an interpleader setting forth the special fund held by the trustee obtained from liquidation of the Milo inventory of

the bankrupt which, with recoveries of Milo made by the trustee, totaled $115,956.44. In such pleading there were set forth the many claimants to the Milo inventory, including Commodity, and the trustee prayed that the Court determine the owners and respective proportions of ownership of the various claimants in such fund. (R. 18-28, No. 4929).

The United States filed a motion to dismiss the trustee's action to recover and, in addition, filed two answers. (R. 33-37, No. 4928). The Referee overruled the motion. (R. 38-39, No. 4928).

The matter came to trial, on the claim, the answer and the action in the nature of interpleader, before the Referee, who found that Commodity, after acquiring information that the bankrupt warehouseman was at least 88% short in its grain storage account, induced the bankrupt to obtain Milo for priority shipment to Commodity at the expense of the other grain depositors and those individuals whom the bankrupt convinced to sell their Milo to the bankrupt on credit. The Referee concluded that the Milo so received, 9,436,780 lbs. had to be charged against Commodity's account in order to determine its pro rata share of the special fund held by virtue of the liquidation of the bankrupt's Milo inventory. (R. 34, 37-38, 40-42, 44-51, 55-58, 60, No. 4929).

Upon petition for review, the District Court affirmed the Referee's determination. (R. 88-90, No. 4929). The matter on appeal was heard by the Court of Appeals sitting *en banc*. Such Court unanimously determined that the District Court and the Referee had jurisdiction to adjudicate the rights of all parties to the Milo fund in the action in the nature of interpleader filed by the trustee and the claims filed by all individuals who alleged ownership of

such Milo inventory, and held further that the determination of ownership and the respective proportion of ownership in such fund was correctly made. 225 F. 2d 499 to 506. (Appendix to Petition 18 to 29).

REASON FOR DENYING THE WRIT.

The decision below is manifestly correct. It determines and construes the law in accordance with the decisions of the Supreme Court of the United States and is not in conflict with any decision from any other Court of Appeals.

ARGUMENT.

The present controversy involves the determination of the owners of the bankrupt warehouseman's Milo inventory. All the individuals who stored Milo with the bankrupt under bailment contracts, or their successors in interest, are tenants in common of the commingled mass of Milo forming such Milo inventory. Such depositors and owners have pro rata rights to the inventory of commingled Milo in the warehouse up to that amount of inventory which is necessary to redeem all their storage obligations. Here the warehouseman was short, and substantially short (see audit report, schedule 16, pages 17 to 20), so that the depositors and owners have pro rata rights in the entire Milo inventory of the bankrupt. This principle is universally recognized and of course is recognized in Kansas where the bankrupt was a public warehouseman. See *Flour Mills of America, Inc.*, v. *Burris Mills*, 174 Kan.

709, 718, 258 P. 2d 341; *Moses* v. *Teetors*, 64 Kan. 149, 67 Pac. 526.*

This Milo inventory came into the possession of the Court and the Court-appointed trustee. It was liquidated with the consent of all parties and the proceeds placed in a special fund, referred to herein as the Milo fund. This fund forms the subject matter of the present controversy. The Court, having custody of such fund, certainly has jurisdiction of the subject matter. *Harris* v. *Avery Brundage Co.*, 305 U. S. 160, 83 L. Ed. 100; *Century Insurance Co.* v. *First National Bank*, 102 F. 2d 726, CA 5, cert. denied 308 U. S. 570, 84 L. Ed. 478; *De Laney* v. *City and County of Denver*, 185 F. 2d 246, CA 10.

The Bankruptcy Court, having custody of such fund—the *res* or subject matter of the action—could have required all the parties who claimed any interest in such Milo inventory to file their claims with the Court. *Barnes* v. *Patrick*, 28 P. 2d 293, 176 Wash. 142; and see *De Laney* v. *City and County of Denver*, 185 F. 2d 246, CA 10. However, it was not necessary for the Court to take this action, since all of the individuals who claimed to be owners of the Milo inventory voluntarily filed claims and all of such claims are set forth in the action in the nature of interpleader filed by the trustee. (R. 18-28, No. 4929). The ag-

---

*See also *Hall* v. *Pillsbury*, 44 N. W. 673, 43 Minn. 33; *Dows* v. *National Exchange Bank of Milwaukee*, 91 U. S. 618, 23 L. Ed. 214; *Jackson* v. *Sevatson*, 82 N. W. 634, 79 Minn. 275; *Kastner* v. *Andrews*, 194 N. W. 824, 49 N. Dak. 1059; *Nieter* v. *McCaull-Dinsmore*, 199 N. W. 85, 159 Minn. 395; *Torgerson* v. *Quinn-Shepherdson Co.*, 201 N. W. 615, 161 Minn. 380; *Barnes* v. *Patrick*, 28 P. 2d 293, 176 Wash. 142; *Carson State Bank* v. *Grant Grain Co.*, 197 N. W. 146, 50 N. Dak. 558; *Hoven* v. *McCarthy Bros. Co.*, 204 N. W. 29, 163 Minn. 339; *In re Bowling Green Milling Co.*, 132 F. 2d 279, CA6; *United States* v. *City of Jacksonville*, 167 F. 2d 366, CA 5.

gregate claims of all such parties were many times greater than the total Milo inventory. In such a situation, each of the tenants in common of the commingled mass must bear the loss *pro tanto* and each may share in what remains according to their equitable interest. The situation calls for an accounting. It is a question for equity. The rights of all should be established in one proceeding. Each owner's claim must abate in proportion. *McDonnell* v. *Bank of China*, 33 F. 2d 816, CA 9, cert. denied 280 U. S. 612, 74 L. Ed. 654; *Flour Mills of America, Inc.*, v. *Burris Mills*, 174 Kan. 709, 719, 258 P. 2d 341; and see 56 *Am. Jur.*, Par. 167, p. 397; Par. 231, p. 426; Par. 232, p. 426.

The United States or Commodity Credit Corporation has no priority to such Milo inventory and stands on the same footing as any other owner. *In re Bowling Green Milling Co.*, 132 F. 2d 279, 284, CA 6; and see *Gulley* v. *Wisdom*, 69 F. 2d 495, CA 5.

Cognizant of these facts and these factors, the trustee filed the action in the nature of interpleader, joining all claimants and praying that the Court determine: First, the claimants who were actually owners and tenants in common of the Milo inventory and, second, the proportion of ownership by each such owner or tenant in common.

It was determined that the Commodity Credit Corporation had withdrawn 9,436,780 lbs. of Milo from the Milo inventory of the bankrupt from and after September 30, 1951, and that it was the only depositor (or one standing in place of the depositor, having acquired the depositor's right) who had made any withdrawal. It was further determined that Commodity learned on September 30, 1951, which was confirmed by its audit of October 7, 1951, that the bankrupt warehouseman was 88% short in its storage obligations and had only 12% of the grain required

to redeem and satisfy the demands of its depositors. With such information, Commodity called a meeting with the bankrupt's manager and induced such manager to procure Milo and give priority of shipment of such Milo to Commodity. (R. 183, 184, No. 4928). Commodity nevertheless claimed that it should retain such Milo obtained prior to bankruptcy and should share in the Milo inventory in the custody of the Court on the same basis as any other owner who had not received any of his Milo prior to bankruptcy. Its position was analogous to the situation before this Court in *Palmer Clay Products Co.* v. *Brown*, 297 U. S. 227, 80 L. Ed. 655. Certainly it would be inequitable to allow Commodity to take part of its claim prior to bankruptcy and thereafter to obtain the same dividend after bankruptcy as the other owners of Milo, since it would give Commodity an inequitable advantage.

All the Courts below agree that to so allow Commodity's claim would do violence to equitable principles and would allow Commodity to take a part of the Milo inventory which in truth and in fact belonged, *pro tanto*, to all the owners. The result reached by all the Courts below was to allow Commodity the same right as the other owners so that each received from the Milo inventory the same percentage of his total established claim, taking into consideration that Commodity had obtained 9,436,780 lbs. of its Milo prior to bankruptcy.

The United States, for and on behalf of its corporate instrumentality, Commodity Credit Corporation, attacks here the judgments of all the Courts below on the ground that the Bankruptcy Court was without jurisdiction to entertain the proceedings and to render the accounting. It is not clear on what ground the jurisdiction is really attacked. Indisputably the Court had jurisdiction of the subject matter, since it had the Milo inventory. It cer-

tainly had jurisdiction of the parties, since they each (including the United States) voluntarily came into Court and filed their claims alleging ownership and seeking possession of such Milo inventory. In this situation, the Court had a duty to determine the respective rights of the parties, to render an accounting, and to grant full and complete relief. Its authority to so act is in accordance with all the principles of equity and the direction of this Court as set forth in *Alexander* v. *Hillman*, 296 U. S. 222, 80 L. Ed. 192. In such case this Court ruled specifically that a Court of equity, having custody of the *res* and of the parties who claim such *res*, is not obliged to work by halves but can, and should, render a full accounting and grant full and complete relief even to the extent of requiring one claimant to restore to the res.*

The very same jurisdictional question came before the Bankruptcy Court, before the District Court on petition for review, and before the Court of Appeals on appeal, arising out of this very same bankruptcy proceeding in *Central States Corporation* v. *Luther*, 215 F. 2d 38, CA 10, cert. denied 348 U. S. 951, 99 L. Ed. 307. In such case, one of the claimants to the same Milo inventory here involved was adjudicated, pursuant to the same action in the nature

---

**Alexander* v. *Hillman, supra,* has been frequently followed on the very question here in controversy by Courts all over these United States and has been reaffirmed frequently by the Supreme Court of these United States. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 399, 90 L. Ed. 1332, 1338; *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 126, 84 L. Ed. 110, 126; *Taylor* v. *Producers Pipe & Supply Co.*, 114 F. 2d 785, CA 10; *Conway* v. *Union Bank of Switzerland*, 204 F. 2d 603, 606, CA 2; *Century Ins. Co.* v. *First National Bank*, 102 F. 2d 726, CA 5, cert. denied 308 U. S. 570, 84 L. Ed. 478; *Banco Kentucky's Receiver* v. *National Bank*, 137 S. W. 2d 357, 281 Ky. 784; *Switow* v. *Sher*, 186 So. 519, 136 Fla. 284.

of interpleader, to have no rights to the Milo inventory, since it did not deposit any Milo. It was required to replace approximately one million pounds which it had obtained from the bankrupt prior to bankruptcy. The claimant, Central States Corporation, sought in this Court on petition for writ of certiorari, to attack the jurisdiction of the Court below to require it to so act and to replace the Milo it obtained from the Milo inventory of the bankrupt owned by others.

The problem presented on the present petition for writ of certiorari is not the same as that presented by *Inter-State National Bank* v. *Luther*, 221 F. 2d 382, CA 10, cert. granted ____ U. S. ____, 100 L. Ed. 51.*

The *Inter-State case, supra*, involves the right of the trustee to, first, defend against the claim filed by the Bank on the ground that the Bank had received a preference; and, second, obtain an affirmative judgment recovering such preference. This Court, and practically

---

*In the Bankruptcy Court. the trustee did endeavor to recover Milo from Commodity which he alleged constituted a preference. The trustee's theory was that the warehouseman was a bailee, which was in all respects similar to the position of trustee, and owed a duty to all the owners of the commingled mass—the tenants in common—to render an accounting and allow each claimant to receive only its pro rata share from the short inventory. Reliance was placed on *Clark* v. *Rogers*, 183 Fed. 518, CA 1, affirmed 228 U. S. 534, 57 L. Ed. 953; *Bank* v. *Schorn*, 135 F. 2d 538, CA 2; *Walser* v. *International Union Bank*, 21 F. 2d 294, CA 2. The Bankruptcy Court rejected this theory of the trustee. It has not been a question since such time and was not urged either in the District Court or the Court of Appeals. Nevertheless the United States bases its whole argument here and its entire reason for the granting of a writ of certiorari on the preference theory first urged by the trustee, although such problem has not been in dispute for about three years.

all the other Courts in these United States, have by their decisions recognized the validity of the defense urged—that the Bank had received a preference—but in most of such cases no affirmative judgment was sought. These decisions were carefully set out in our brief for respondent in opposition filed in the Inter-State matter. There was, however, a conflict between such decisions and a decision of the Court of Appeals for the Fifth Circuit. We certainly agree that if the jurisdiction to render an affirmative judgment is upheld by this Court in the Inter-State matter, such decision will necessarily result in an upholding of jurisdiction in the present controversy with the United States. However, we submit, it is possible for us to lose in the Inter-State matter and still prevail in the present matter. The Court of Appeals itself recognized a difference in the problems involved in the two cases. The Inter-State decision, heard by the Court of Appeals *en banc*, was a three to two decision, while the present controversy was decided by the same Court of Appeals, sitting *en banc*, five to none. Basically, the problem in the Inter-State case is whether the equitable principles announced by this Court in *Alexander* v. *Hillman, supra*, should be extended into the Bankruptcy Act itself so that the trustee may recover from a claimant a part of the general assets received by such claimant in violation of the preference statute, which properties actually belong to, and are wrongfully withheld from, the general assets of the bankrupt.

In the present controversy there is no conflict of decisions. The Courts below decided the controversy on universally recognized principles, followed the directions given by this Court's own decisions and the decisions rendered by all other Courts on the same problem since this Court's determination of *Alexander* v. *Hillman, supra*.*

---

*As a matter of fact, the United States or Commodity has absolutely no monetary interest in the outcome of the present

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN F. EBERHARDT,
608 Fourth National Bank Building,
Wichita 2, Kansas,
MALCOLM MILLER,
608 Fourth National Bank Building,
Wichita 2, Kansas,
Counsel for Respondent.

---

petition. It has been determined that except for the receipts purchased by Commodity after bankruptcy (see *United States* v. *Marxen*, 307 U. S. 200, 83 L. Ed. 1222) Commodity has a priority. It will, therefore, receive all its claim, if not from the Milo inventory, from the general assets of the bankrupt.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS.

IN THE MATTER OF GARDEN GRAIN AND SEED COMPANY, INC., Bankrupt.	In Bankruptcy. No. 370-B-2.

Transcript of Proceedings.

APPEARANCES:

Honorable E. R. Sloan,
Referee.

MALCOLM MILLER	Wichita, Kansas, appeared for the trustee, who also appeared in person.
WILLIAM FARMER	Topeka, Kansas;
GERALD O'ROURKE	Washington, D. C.;
G. H. PENSTONE	Kansas City, Missouri;
HAROLD HOUSKE	Kansas City, Missouri; all appeared for the United States Government and Commodity Credit Corporation.
JOHN S. HOLDEN	Cimarron, Kansas, appeared for various claimants, approximately 50 in number.
RALPH HOPE	Wichita, Kansas, appeared for various claimants.

R. C. Schneider,
Reporter.

* * * * *

BE IT REMEMBERED that on this 29th day of September, 1955, (T. 2), the above matter came on for hearing at Topeka, Kansas, before the Honorable E. R. Sloan, Referee in Bankruptcy for the District of Kansas, the parties appearing in person and/or by counsel as hereinbefore set forth, and the following proceedings were had:

THE REFEREE: Very well, gentlemen, are you ready to proceed?

MR. MILLER: We are, Your Honor. If Your Honor please, I would like to hand to the Reporter an amendment to the Petition for Distribution of the Milo Fund, which amends paragraph 3 only, and the sole purpose of the amendment is to reflect the additional $19,771.95 which went into the milo fund from the Central States Corporation.

THE REFEREE: That makes a total fund of $135,728.39?

MR. MILLER: That is right. If Your Honor please, I suppose as good a way to proceed as any is to just to file in the first instance our proposed distribution of this milo fund. We quite obviously, since the change in the amount of the fund, had to change the schedules which were originally filed with the petition for that distribution.

THE REFEREE: I was a little inclined to think that what I should dispose of first is the mandate.

MR. MILLER: I think this is a part of the mandate, if Your Honor please. What the Court of Appeals said was that you must (T. 3) recompute the division of the funds.

THE REFEREE: Very well.

MR. MILLER: And we have two funds, as Your Honor well knows, the milo fund and the wheat fund, and I think we should take them up separately.

I will hand to your Reporter also our revised schedule which we have made up since the mandate from the Court of Appeals came down.

THE REFEREE: Wouldn't it be better if you introduced it by your auditor?

MR. MILLER: I will have the auditor identify and explain it. I think I have a copy I can hand Your Honor, besides the one here. As long as we have him on the stand I think we might just as well explain the wheat one which follows it.

THE REFEREE: I think I had better give the Government a chance to state—

MR. MILLER: The Government has copies of these schedules and has had for some weeks. If Your Honor please, we will be glad to proceed and put in evidence the records that make up these schedules and have the auditor explain how the schedules are made up, at this time or at any time Your Honor desires.

THE REFEREE: I believe the Government has some suggestion in their objection, and I had better hear what they have to say.

MR. O'ROURKE: May it please the Court we have filed our (T. 4) substituted and amended specifications of objections to petition for distribution of milo fund by the trustee. We object on the following grounds to that petition: (T. 5).

* * * * *

MR. FARMER: I think we can save a lot of time if we take a recess and argue back and forth and work out our differences. (T. 24).

THE REFEREE: That is why I stated what I thought the general rules are on the basic questions. We will take a half-hour recess and see if you can make some headway on getting together.

MR. MILLER: We will do our best, Your Honor.

(Court recessed from 10:55 a. m. until 1:45 p. m.)

THE REFEREE: Very well, gentlemen, are you ready to proceed?

MR. MILLER: If the Court please, since you adjourned we have had a conversation with the representatives of the Government and have reached an agreement, subject of course to approval. In lieu of the distribution which we have proposed, and on which we would have offered evidence, and in lieu of what the Government would have approved and what they would have offered evidence on, we will agree that the total amount of wheat and milo share belonging to Commodity is, from the two grain funds, $49,255.91, and—

THE REFEREE: I didn't get that figure.

MR. MILLER: $49,255.91, and I might tell Your Honor of that amount $37,474.61 is milo and $11,781.30 is wheat, which totals $49,255.91. That is the total share of the combined grain funds due Commodity, which will be reduced by a storage figure of an even $12,000.00, making a distribution to Commodity from the special grain fund of $37,255.91.

As a part and parcel of that agreement, because Commodity purchased four warehouse receipts, two for milo and two for wheat, (T. 25) after bankruptcy, we stipulate and agree that the portion of Commodity's claim which will be allowed as a common claim without priority is $13,000.00. Those four receipts, their value is a little over $16,000.00, and we will agree that the non-priority portion of Commodity's claim is $13,000.00.

I think that leaves us only the question of the set-off and the Guaranty Agreement and the tax set-off question to determine the amount that Commodity claims has with priority.

THE REFEREE: Mr. Holden, have you seen these figures?

MR. HOLDEN: Yes, sir.

MR. FARMER: For the information of the Court everybody in attendance for the Government at this hear-

ing is in agreement with that settlement, and during the recess we put in a long distance call to Mr. John Laughlin of the Appellate Division of the Department of Justice, and he is in agreement also, and he indicated that the Civil Division has generally gone along with his recommendations and that they would go along with this. There is that one minute possibility that they won't approve it, but I don't think we will have any trouble.

THE REFEREE: What was that?

MR. FARMER: There is one minute possibility that the Attorney General won't go along with the settlement, but at least the Department of Justice, up to that level, has indicated they would. I couldn't get ahold of the head of the Civil Division. (T. 26). He was out of the office.

THE REFEREE: Mr. Holden, what do you say about agreeing to these figures?

MR. HOLDEN: I have talked to Mr. Nelson and I agree— From the information I have gotten from Mr. Miller and Mr. Nelson I will agree to them.

THE REFEREE: Is that satisfactory with you, Mr. Luther?

MR. LUTHER: Yes, sir.

THE REFEREE: I think, gentlemen, you are to be congratulated on getting together on these figures. I have studied them a good deal and it is pretty hard to figure out any fair adjustment such as you have made, so the figures agreed to will be accepted by the Court.

MR. O'ROURKE: We have discussed the matter of the sureties with Mr. Miller—

MR. MILLER: I have told the representatives of the Government that both sureties had contacted me, to be very frank with Your Honor, to see if there was anything they might do to get this matter behind us. I advised them that the non-priority portion of Commodity's claim

couldn't be more than $16,000.00, less whatever dividend there would be on it—we have agreed now it will be $13,-000.00 and they will receive a dividend like any other creditor on that amount—they have assured me, subject to how (T. 27) they are going to adjust it between themselves, they will not litigate the matter with the Government relative to the decision, and what the dividend doesn't pay of that $13,000.00 they will pay, and it is with that in mind that we did get together.

THE REFEREE: I don't think this Court has any jurisdiction over that. They don't have anything to do with this case.

MR. MILLER: I am as sure as I can be that they will do so. I wanted you to know about it.

THE REFEREE: What other question is there to settle?

MR. FARMER: This settlement is contingent upon the sureties coming through with the balance of that $13,-000.00.

MR. MILLER: They obviously can't pay you today. Their idea is they will not litigate it.

MR. FARMER: I understand.

MR. MILLER: We still have the question relating to the amount of the set-off and specifically the Storage Guaranty Agreement and the tax refund to apply to Commodity's claim not satisfied from the grain fund and not included in the $13,000.00 which they do not have priority on. So we will need to put on evidence on the Storage Guaranty Agreement first.

THE REFEREE: Let me see: The figures you have agreed to will completely settle the distribution?

MR. MILLER: As far as the grain funds are concerned, that is right.

THE REFEREE: Now the question is— (T. 28)

MR. MILLER: The priority claim from the general assets.

THE REFEREE: Very well, I believe we had better take those up first. I don't care how you do it." (T. 29).

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

IN THE MATTER OF GARDEN GRAIN AND SEED COMPANY, INC., Bankrupt.	In Bankruptcy. No. 370-B-2.

Order for Distribution of Wheat and Milo Funds.

The petitions for distribution of the Wheat and Milo funds filed by the Trustee, after notice to all interested parties, as provided by law, came on for hearing this 29th day of September, 1955, before the Honorable E. R. Sloan, Referee in Bankruptcy; The United States Government and Commodity Credit Corporation appeared by and through their attorneys, William C. Farmer, United States Attorney, G. H. Penstone, Regional Attorney, United States Department of Agriculture, Harold Houske, Attorney, United States Department of Agriculture, Jerome O'Rourke, Attorney, Department of Agriculture, Washington, D. C.; a group of grain claimants appeared by and through their attorney, John Staley Holden of Cimarron, Kansas; another group of grain claimants appeared by and through their attorney, Ralph Hope of Wichita, Kansas; the Trustee appeared with his attorney, Malcolm Miller, Wichita, Kansas, and there were no other appearances of interested parties.

The Trustee, through his attorney, made an amendment to paragraph 3 of the petition for distribution of the Milo fund to incorporate the recovery of $19,771.95 from the Central States Corporation, making a total sum result-

ing from Milo liquidation and recovery of Milo of $135,-728.39.

The Trustee, through his attorney, also filed amended schedules for distribution of the Wheat fund disclosing the claimants, the total of each claim as allowed by the Court, the total fund of $18,271.25, the storage deduction for grain or the equivalent thereof received by each claimant, the net distribution, the bushels remaining unsatisfied and the value of such bushels remaining unsatisfied to be allowed as common claims.

The Trustee, through his attorney, also filed amended schedules for distribution of the Milo fund, showing each of the successful claimants and the amount of their claim as allowed by this Court, the total fund to distribute, $135,728.39, the storage deduction claimed on the grain or equivalent thereof received by each claimant, the net distribution to each claimant, the pounds remaining unsatisfied and the value thereof, less accounts receivable offsets to be allowed as common claims.

After hearing objections filed by United States and Commodity Credit Corporation to the petitions for distribution of both the Wheat and the Milo funds, and being duly advised in the premises and the manner of ascertaining the gross claim, storage deduction, net claim from the grain funds and the common creditor portion for each of the successful claimants as established under the orders of this Court to the grain funds and after stipulation as between the Trustee and the United States and the Commodity Credit Corporation being made in open Court under which Commodity and the Trustee stipulated and agreed to a storage deduction from Commodity's claim to both the Wheat and Milo funds of $12,000.00 and further stipulated and agreed in open court the portion of Commodity's claim

to be allowed as a common claim without priority amounted to $13,000.00, the Court finds and concludes:

1. That distribution should be made to the successful claimants to the Wheat fund as set forth in the attached Exhibit A in column 1 thereof, such Exhibit A being made a part hereof, and that the total of such fund, $18,271.25 be paid to such creditors as shown in column 1 forthwith by check of the Trustee in the amounts set forth in column 7 of Exhibit A attached hereto and that the residue, $697.80 be paid by the Trustee into the general fund of the Bankrupt for distribution to the general creditors, subject to costs of administration.

It is further ordered that each of such claimants as set forth in column 1 of Exhibit A shall be, and they are hereby, allowed common claims, without priority, in the amounts as set forth in column 9 of Exhibit A attached hereto, with the exception of the Commodity Credit Corporation.

It is further ordered that all persons other than those as set forth in Exhibit A attached hereto who might in any manner have asserted any claim against the fund arising from the liquidation of Wheat by the Trustee should be, and they are hereby, forever foreclosed from asserting any claim other than those heretofore adjudicated by the Court and as set forth in Exhibit A attached hereto.

2. That distribution should be made to the successful claimants to the Milo fund as set forth in the attached Exhibit B in column 1 thereof, such Exhibit B being made a part hereof, and that the total of such fund, $135,728.39, be paid to such creditors as shown in column 1 forthwith by check of the Trustee in the amounts set forth in column 7 of Exhibit B attached hereto and that the residue, $13,783.04, be paid by the Trustee into the general fund

of the Bankrupt for distribution to the general creditors, subject to costs of administration.

It is further ordered that each of such claimants as set forth in column 1 of Exhibit B shall be, and they are hereby, allowed common claims, without priority, in the amounts set forth in column 11 of Exhibit B attached hereto, with the exception of the Commodity Credit Corporation.

It is further ordered that all persons other than those as set forth in Exhibit B attached hereto who might in any manner have asserted any claim against the fund arising from the liquidation of Milo by the Trustee should be, and they are hereby, forever foreclosed from asserting any claim other than those heretofore adjudicated by the Court and as set forth in Exhibit B attached hereto.

3. The Commodity Credit Corporation is allowed a distribution which the Trustee shall pay forthwith by check made payable to the Treasurer of the United States from the Wheat fund in the amount shown in Exhibit A, column 7, opposite Commodity Credit Corporation, $11,333.94; and shall be paid from the Milo fund by check made payable to the Treasurer of the United States the amount set forth in Exhibit B, column 7, opposite Commodity Credit Corporation, $25,921.97; the rest and residue of its claim from the Wheat fund, $34,944.84, as shown by column 9 of Exhibit A and the rest and residue of its claim to the Milo fund, $36,920.38, as shown in column 11 of Exhibit B attached hereto shall be allowed as a common claim. It is ordered that of such total common claim, $71,865.22, $58,865.22 shall be allowed as a common claim with priority as provided by law, subject to set-offs of the Trustee as may be hereinafter adjudicated, and that the rest and residue, $13,000.00, be allowed as a common claim, without prjority.

4. It is further ordered that the Trustee shall forthwith transfer from the special fund the tonnage obtained by the Trustee, $8,032.14, to the general fund, for the benefit of common creditors, subject to costs of administration.

Dated this 4th day of October, 1955, at Wichita, Kansas.

(Signed) E. R. Sloan
Referee in Bankruptcy

I certify that this is a true copy of the original on file in this court and cause.

Dated Oct 4 1955
(Signed) E. R. Sloan
Referee in Bankruptcy for the District of Kansas

Sec. 2, Bankruptcy Act, 11 U. S. C. 11

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * * * *

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualifed; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

* * * * *

(6) Bring in and substitute additional persons or parties in proceedings under this title when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine contro-

versies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

* * * * *

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

* * * * *

(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. As amended May 27, 1926, c. 406, sec. 2, 44 Stat. 662; June 22, 1938, c. 575, sec. 1, 52 Stat. 842; July 7, 1952, c. 579, sec. 2, 66 Stat. 420.